

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

February 10, 2009 Session

DANIEL SCOTT WHITLEY v. MARY DIANE WHITLEY

Appeal from the Circuit Court for Blount County

No. E-20438 W. Dale Young, Judge

No. E2008-00977-COA-R3-CV - FILED JULY 28, 2009

In this divorce case, the defendant, Mary Diane Whitley (“Wife”), appeals and raises four issues. She argues that the trial court’s division of property is not equitable; she contends that the court erred when it awarded a judgment against her for the attorney’s fees of her former spouse, Daniel Scott Whitley (“Husband”); she claims that the court should have awarded her spousal support; and, lastly, she argues that the court should have given her a judgment for attorney’s fees against Husband. We affirm the trial court’s division of the parties’ property; reverse the award of fees to Husband; reverse the court’s decision not to award Wife alimony and hereby award her transitional alimony of \$750 per month for 12 months; and hold that Wife is entitled to an award of reasonable attorney’s fees and expenses. Case remanded for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part and Reversed in Part; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and J. STEVEN STAFFORD, J., joined.

L. Caesar Stair, III, Allison D. Easterday and Margo J. Maxwell, Knoxville, Tennessee, for the appellant, Mary Diane Whitley.

Robert W. White, Maryville, Tennessee, for the appellee, Daniel Scott Whitley.

OPINION

I.

A.

The parties were married on June 21, 2001. Husband was then 47 and Wife was 43. No children were born to their union. The parties separated a day or so before Husband filed for divorce

on December 14, 2004. While they had lived together before their marriage, their time together in marriage, as can be seen, lasted only for some three and a half years.

Each of the parties came to the marriage with real property. Husband owned a house and lot at 2116 Middlewood Drive in Maryville with a gross value at the time of marriage of \$275,000. It was then subject to a mortgage indebtedness of \$195,000. At the time of the divorce, the property had a value of \$350,000; it was subject to a first mortgage debt of approximately \$183,000 and a second mortgage equity line of credit of \$100,000.

Wife owned two pieces of real property at the time of the marriage. She was the title owner of a house and lot in Knoxville municipally designated as 1611 Washington Pike. The only gross value reflected in the record – \$60,000 – is as of the time of the divorce. She also owned, pre-marriage, a house and lot at 214 Cedar Crest Lane in Friendsville, with a gross value of \$110,000 at the time of the parties' divorce. It was then subject to a mortgage debt of \$69,000.

Husband owned another significant asset at the time of this marriage, a 401(k) account through his employer, National Seating Company, with a gross value of \$96,726.23. An element of that value was a loan receivable from Husband in the amount of \$6,678.50.

During the parties' marriage, Wife, a realtor, suggested that the parties purchase real estate as an investment. To initially facilitate this venture, the parties took out a \$100,000 line of credit against Husband's equity in his Middlewood Drive property for the purpose of purchasing property in Sevierville. Other real estate investments followed. By the time of the divorce, the parties' real estate holdings, separate and marital, and associated debt were as follows:

1. Middlewood Drive was still encumbered by Husband's original first mortgage plus a line of credit second mortgage of \$100,000.
2. 538 Orchard Valley Way, Sevierville, was owned, in Wife's name alone,¹ and was subject to a line of credit first mortgage of \$100,000.
3. 123 Tobler Lane, Knoxville, was purchased for \$115,000. At the time of divorce, it was subject to a \$96,000 first mortgage.
4. Washington Pike, valued at \$60,000, was subject to a mortgage of \$30,000.
5. Cedar Crest Lane, valued at \$110,000, was subject to a first mortgage debt of \$69,000.

¹Husband testified that he was unaware until much later that his name had been left off the title.

B.

Over the course of a multiple-day bench trial in June and July 2006, the court heard extensive testimony, primarily from the parties, pertaining to the parties' real estate holdings, Husband's 401(k), and, to a much lesser extent, the parties' other relatively-insignificant personal property. Much of the latter property was disposed of by way of the parties' pre-trial stipulation and agreement. The parties' primary dispute focused on the real estate holdings, both before the marriage and at the time of the divorce. Many pages of the parties' testimony are devoted to the securing of the two equity lines of credit, who handled them, the collection and use of rental income, the use of the proceeds from the lines, and the interaction, or lack thereof, between the parties with respect to their real estate holdings. Accusations of mishandling were hurled back and forth. The trial court did not dwell on this testimony in his decision and it does not appear to have influenced his judgment in any significant fashion.

As relevant to the issues on appeal, Husband's proposed distribution of property was that he would receive his 401(k) and that the parties would dispose of 538 Orchard Valley Way, 123 Tobler Lane, and 1611 Washington Pike; that the first mortgage debts associated with these properties would be paid from the proceeds; and that both of the lines of credit would be paid off. Furthermore, Husband proposed that he would keep 2116 Middlewood Drive subject to the first mortgage indebtedness, and that Wife would receive 214 Cedar Crest Lane subject to its first mortgage debt.

Wife proposed a different approach. She urged the trial court to award Husband Middlewood Drive and Orchard Valley Way, subject to *all* of the debt associated with those properties. She proposed that she would receive Tobler Lane, Washington Pike, and Cedar Crest Lane, again subject to associated debt. Wife wanted a share of the increase in Husband's 401(k) that occurred during the marriage.

The trial court adopted Husband's approach *in toto*. Following the court's decree, Orchard Valley Way, Tobler Lane, and Washington Pike were all sold; the first mortgage debts were paid; and the two lines of credit were paid in full. After all of this occurred, the net proceeds, just over \$7,600, were distributed to the parties. Husband received \$4,301.49 and Wife got \$3,321.26. Wife was left with Cedar Crest Lane with a value of \$110,000 subject to a pre-marriage mortgage debt then in the amount of \$69,000. Husband received Middlewood Drive with a value of \$350,000 subject to his pre-marriage mortgage with a present balance of \$183,000. The court awarded Husband the entirety of his 401(k) of some \$158,000.

On the subject of attorney fees, the court ordered Wife to pay Husband's requested attorney's fees of \$16,759. The court denied Wife's prayer for fees.

This appeal followed.

II.

Wife presents four issues that raise the following questions:

1. Is the division of property equitable?
2. Is Husband entitled to an award of fees and expenses against Wife?
3. Is Wife entitled to an award of fees and expenses.²
4. Is Wife entitled to spousal support?

III.

Our review of the trial court's findings of fact is *de novo* upon the record of the proceedings below, accompanied by a presumption of correctness, a presumption we must honor unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption of correctness as to the trial court's conclusions of law. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996). We give great weight to a trial court's credibility determinations. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997).

IV.

All of the subjects addressed by Wife's issues involve the discretion of the trial court. *Batson v. Batson*, 769 S.W.2d 849, 850 (Tenn. Ct. App. 1988); *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995). The trial court can only be found to have abused its discretion when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (citing *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). This standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). As a part of our review of the trial court's discretionary functions, we look to see if the evidence preponderates against the court's factual findings supporting its decisions.

²In the "Conclusion" section of her brief, Wife asks for fees and expenses on appeal. This is not mentioned in the "Issues Presented for Review" section of the brief. Even if the issue had been properly submitted, which it was not, we would not have been inclined to grant such fees and expenses.

V.

A.

A trial court is required to equitably divide the marital property of divorcing parties. Tenn. Code Ann. § 36-4-121(a)(1); **Jolly v. Jolly**, 130 S.W.3d 783, 785 (Tenn. 2004). The court must consider all relevant factors set forth in the governing statutory provision. Tenn. Code Ann. § 36-4-121(c). While the court can consider other relevant factors – even though not specifically listed in the controlling statute, Tenn. Code Ann. § 36-4-121(c)(11) – it must make its division without regard to marital fault. Tenn. Code Ann. § 36-4-121(a)(1).

B.

Both parties and the trial court verbalized that their analysis of the division of property in this case was based upon the well-established legal precedent that “in cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place.” **Batson**, 769 S.W.2d at 869. It is clear from the briefs as well as the record of the proceedings below, that the question of whether the division of the marital estate is equitable largely turns on the disposition of the real property and its associated debt; in fact, there is little dispute about the distribution of any of the remaining assets. Accordingly, we focus, as did the parties and the trial court below, on the distribution of the real property and mortgage debt.

C.

The trial court chose Husband’s approach of collapsing all of the *post-marriage* real estate investments as well as Wife’s pre-marriage property at 1611 Washington Pike as a means of “divid[ing] the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place.” *Id.* Could the same objective have been achieved with a different approach? Perhaps, but that is not the issue. Our standard of review does not permit us to substitute “how we would have done it” for a court’s contrary approach as long as we find it to be equitable.

Under the trial court’s approach, both parties retained a residence with the pre-marriage mortgage indebtedness in place – a debt not increased by the parties’ venture into real estate investing. While it is true that Wife lost her pre-marriage investment in 1611 Washington Pike, that piece of property was impacted by the parties’ “real estate business” in that \$22,000 out of the second equity line of credit was used to install a new expensive roof on that residential property. We recognize that the parties had somewhat conflicting views as to how the roof came to be replaced and at what cost; but since the trial court opined that it “[f]ound] it hard to believe much of the testimony [Wife] gave,” we hold that the evidence does not preponderate against the trial court’s decision to sell Washington Pike.

There is another significant factor supporting the trial court's decision with respect to the parties' assets. Much of what the court awarded in terms of the net value of Middlewood Drive, the net value of Cedar Crest Lane, and Husband's 401(k), was clearly separate property. Furthermore, the evidence preponderates against a finding that the post-marriage increase in value of Middlewood Drive can be properly characterized as marital property. The trial court obviously accredited Husband's testimony on this issue. On the contrary, the evidence preponderates that this increase in value is, like the underlying value, separate property. With respect to the increase in value of Husband's 401(k), we find little evidence that the increase is marital rather than separate. We note, in passing, that Wife's brief does not expressly argue that any portion of the 401(k) is marital property. Furthermore, there is a lack of evidence as to how the value of the 401(k) grew during the marriage.

The trial court's approach to the parties' separate and marital properties is in keeping with the *Batson* principle. The evidence does not preponderate against the trial court's division of property. Certainly, we cannot say that the court abused its discretion in crafting its "property" decree.

VI.

An award of attorney's fees in divorce litigation is alimony *in solido*. *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). In contemplating such an award, a court must carefully consider the relevant factors set forth in Tenn. Code Ann. § 36-5-121(i). Awards of attorney's fees are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002).

We address two of Wife's four issues in this section – the award of fees and expenses to Husband and the court's decision to deny such an award to Wife. We first address the award to Husband of fees and expenses in the sum of \$16,759. The evidence preponderates against this award. The proof clearly shows that Wife does not have the funds to pay Husband's fees and expenses. *Hunter v. Hunter*, M2002-02560-COA-R3-CV, 2005 WL 1469465 at *11 (Tenn. Ct. App. M.S., filed June 21, 2005). The trial court abused its discretion in awarding fees and expenses against Wife.

The court also abused its discretion in refusing to award fees to Wife. It is clear that she is economically disadvantaged *vis a vis* Husband.³ During the marriage and up to the time of the

³We are not unmindful of the fact that the trial court was less than impressed with Wife or her testimony. The court noted as follows:

The Court is of the opinion and finds that [Wife] is an unusually manipulative person, irrational and the Court finds it hard to believe much of the testimony she gave.

In finding Wife economically disadvantaged, we have relied upon documentary evidence and uncontradicted testimony in the record.

divorce, Husband earned significantly more than Wife.⁴ Wife's award of separate and marital property pales in comparison to that of Husband. She has a demonstrated need for this species of alimony *in solido* and Husband has the ability to pay.

On remand, the trial court is directed to award Wife reasonable fees and expenses for professional services rendered at the trial court level, said award to be in the nature of alimony *in solido*.

VII.

There are no hard and fast rules governing spousal support decisions. *Anderton v. Anderton*, 988 S.W.2d 675, 682-83 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Just as in the case of attorney's fees, alimony decisions require careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i). Trial courts have broad discretion in determining whether spousal support is needed and, if so, the nature, amount, and duration of support. *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996).

"Transitional alimony" is defined in the statute as "a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time." Tenn. Code Ann. § 36-5-121(g)(1). The statute provides that transitional alimony is to be awarded when the court finds that "rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce. . . ." *Id.*

In this case, Wife is not in need of rehabilitation. She has skills that, with time, will enable her to transition to a productive life and overcome the economic consequences of her divorce. However, as previously noted, she is economically disadvantaged when her circumstances are compared to those of her former spouse. Furthermore, Husband has the resources to pay a reasonable amount of transitional alimony for a reasonable period of time. We hold that an appropriate transitional alimony award is \$750 per month for 12 months.⁵

VIII.

The judgment of the trial court respecting the parties' separate and marital property and associated debt is hereby affirmed. So much of the judgment as requires Wife to pay the attorney's fees and expenses of Husband is hereby reversed and held for naught. We also reverse the trial court's decision not to award Wife alimony and hereby award her transitional alimony of \$750 per month for 12 months beginning on the first day of the first month following the month in which this

⁴Husband earned \$96,433 in 2005. Wife's gross income in 2004 was \$41,400 and her gross income in 2005 from Realty Executives was \$35,262.55.

⁵The trial court did not mention that "fault" was a factor in any of its three "alimony" determinations. The parties stipulated pre-trial that both of the parties were entitled to a divorce. In fact the parties were granted a divorce by order entered April 17, 2006, a couple of months before the final hearing.

court's opinion and judgment are filed. Wife is also awarded her reasonable attorney's fees and expenses in connection with services rendered at the trial court level, said fees and expenses to be set by the trial court on remand and designated as alimony *in solido*. Costs on appeal are divided half to Daniel Scott Whitley and half to Mary Diane Whitley. Case remanded for further proceedings consistent with this opinion.

CHARLES D. SUSANO, JR., JUDGE